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IN THE

# Supreme Court of the United States

OCTOBER TERM 1968

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NUMBER 1015

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AMBRY D. ALLEN, JR.,

*Petitioner,*

v.

THE STATE OF GEORGIA,

*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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### OPINIONS BELOW

The opinion and judgment of the Court of Appeals of Georgia and the denial of certiorari by the Supreme Court of Georgia without opinion, as yet unreported officially, is appended to the petition.

### JURISDICTION

Jurisdiction has been invoked by the petitioner under the provisions of 28 U.S.C.A., Sec. 1257 (3). Jurisdiction is doubted by respondent on the ground that there

is no substantial Federal question presented for review. Cf. Rule 19 (1) (a), United States Supreme Court.

## QUESTION PRESENTED

Respondent cannot agree with the wording of the question, as set out in the Petition, because as worded the question assumes as true most material facts which Repondent insists were not proven by the evidence in the proceedings to vacate and set aside the sentence in the Superior Court, and which are also not pertinent to the issues in this case, in view of the full scope of the decision of the Court of Appeals which is sought to be reviewed.

Therefore, Respondent respectfully insists that the entire issue before this Honorable Court can be properly summed up in the following questions:

1. **Whether the Court below erred in ruling that the same ground of the motion was decided adversely to the Petitioner by the Georgia Supreme Court in a Petition for Habeas Corpus previously raised.**
2. **Whether the Court below erred in ruling that the motion to vacate and set aside the sentence was not timely made some three years later and after both the Prosecuting Attorney and Trial Judge were deceased.**
3. **Whether the Court below erred in affirming the trial court's finding that the plea of guilty was entered voluntarily where admittedly:**
   - **(a) The Petitioner's counsel clearly advised him that the Court would impose a sentence of seven years to serve.**

**(b) The Petitioner understandingly and voluntarily entered a plea of guilty and rejected the advise of his counsel.**

## STATEMENT OF THE CASE

The Petitioner states the facts and the chronology of the proceeding in this case in a manner that does not reflect the true status of the issues. His statement alleges as true facts which are amply reflected by the State's evidence and omits material salient portions of the evidence relevant to the State Court's ruling.

In accordance with Rule 40 (3) of this Court, Respondent wishes to give the following statement summarizing relevant points of evidence in the case.

A. CHRONOLOGY

The Petitioner, Ambry D. Allen, Jr., was indicted along with other members of a stolen car ring by the Grand Jury of Fulton County on February 22, 1963, and was charged with twenty-six (26) counts of Automobile Larceny contained in eight indictments. An original plea of guilty was entered by the Petitioner to all charges in Fulton Superior Court before Judge Luther Alverson in the early part of 1963. (R-17) [1]

During a fifteen day grace period allowed by the Court upon the Petitioner's motion before the imposition of sentence, the Petitioner fled the jurisdiction remaining a fugitive from justice until March, 1964. He was captured in North Carolina in March, 1964, pled guilty in Federal Court to interstate transportation of stolen motor vehicles, and was sentenced to serve in the U. S. Penitentiary at Atlanta, Georgia for three years.

[1] R. refers to the original page of the record below. A copy was not made below of the record sent to this court.

(R-46) Subsequently, a Writ of Habeas Corpus Ad Prosequendum was issued to produce the Petitioner in Fulton Superior Court for disposition of the State charges upon the prisoner's request. (R-10 see note 2)

The Petitioner again pled guilty in Fulton Superior Court on August 5, 1964, and was sentenced to seven (7) years to serve that day by Judge Stonewall Dyer, the Court allowing the original plea to be withdrawn prior to sentencing and a new plea entered. (R-14, 29-30)

More than three years later, the Petitioner brought a Petition for Writ of Habeas Corpus on August 22, 1967, in DeKalb County Superior Court and this Motion to Withdraw Plea and Set Aside Judgment of Conviction and Sentence on September 19, 1967, in Fulton Superior Court, both upon the *same ground* that the guilty plea entered was not voluntary and that it was "induced" by alleged promises to him by the then Solicitor General, now deceased. (R-39, 15) The Habeas Corpus Writ was denied in DeKalb County Superior Court and affirmed by the Georgia Supreme Court on January 18, 1968, in *Allen v. Caldwell, Warden,* 224 Ga. 47. After a hearing by a different judge, Judge Dyer also being deceased, the Motion to Withdraw the Plea was denied in Fulton Superior Court on March 21, 1968 and affirmed by the Court of Appeals of Georgia the latter part of 1968.

## B. THE PETITIONER ADMITTEDLY KNOWINGLY AND VOLUNTARILY ENTERED A PLEA OF GUILTY ON AUGUST 5, 1964

The evidence is uncontradicted that the Petitioner voluntarily entered a plea of guilty and understood before the trial judge pronounced sentence that he would

receive sentences totaling seven (7) years to serve. Petitioner's attorney stated:

> "Well, the pleas were as I told you, the old pleas were marked out and new pleas entered on all indictments, and then A.D. signed the pleas of guilty, and I signed as his attorney after explaining to him thoroughly what the Court has said, and what the sentence would be which would be seven years to serve." (T-32) [2]

The Petitioner's testimony corroborated this:

> "Mr. French, he walked back over and told me, said you're going to get a seven year sentence." (T-77)

The evidence is uncontradicted that the Petitioner had explained to him clearly that he would be getting a sentence of seven years to serve. (T-77) The evidence is uncontradicted that he understood that a guilty plea could be withdrawn before sentence was passed especially since a prior plea of guilty to the same charges had just been withdrawn a few minutes earlier. (T-77) By his own admissions, he rejected the advice of his counsel and did not withdraw his plea of guilty. (T-77)

### C. THE EVIDENCE SUPPORTS A FINDING THAT NO INDUCEMENTS WERE MADE BY THE SOLICITOR GENERAL

More than three years after sentencing and after both the Solicitor General and the Trial Judge are deceased, the Petitioner brought this present action seeking to Vacate and Set Aside the Sentence by alleging that the plea of guilty was "induced" by alleged promises to him by the Solicitor General. In a hearing conducted before a different judge, Judge Dyer being deceased, the Peti-

[2] T. refers to the original transcript page.

tioner's evidence consisted of the testimony of his brother – a convicted automobile thief, his attorney, and himself. Although several persons were mentioned by the Petitioner and his brother as being able to prove the alleged promises, none were produced at the hearing. (R-18, 20, 31, 34) (T-79)

The Statement of Facts in Petitioner's Brief should be considered as only his contentions because even though the primary witnesses for the State were deceased, the evidence produced on behalf of the State amply refuted the allegations. Moreover, the Petitioner's evidence is conflicting in several material areas.

Assistant Solicitor General J. Robert Sparks testified that the appearance of the Petitioner before Fulton County Superior Court Judge Dyer was initiated by the Petitioner. (R-47) (T-53) Sparks testified that the Petitioner initially expressed the wish to plead guilty to all outstanding indictments to him and wanted to know what would be the least sentence Sparks would recommend. (R-47) (T-53) This statement is supported by the Writ of Habeas Corpus Ad Prosequendum (R-10), but is contrary to the Petitioner's testimony. Witness Sparks testified that the then Solicitor General Boyd recommended in open court that Petitioner A. D. Allen receive a sentence of "a total of 7 years to serve." He testified that Solicitor General Boyd had told him during several discussions that seven years was the very least he could recommend to the court. The day before Solicitor General Boyd said if Allen didn't plea to 7 years to serve for Sparks to place the case on the calendar for trial. (R-53) This is supported by the total sentence of 7 years and the affidavit of A. D. Allen:

> "Mr. Boyd told me that since I was pleading guilty in the Fulton Superior Court with all the news media present, he would like me to take a seven year sentence." (R-36)

John Williams testified that he went to the United States Penitentiary, Atlanta, on Solicitor General Boyd's instructions and informed the Petitioner that the least time Mr. Boyd would recommend to the Judge upon a guilty plea would be seven years to serve. The witness testified that he was present at the time the plea was entered before Judge Dyer where Solicitor General Boyd recommended a sentence of seven years to serve. (T-95, 96) (R-45)

The Petitioner's accounts of the sentence promised are conflicting. Where in his previous affidavit he testified that he was requested to enter a plea of guilty to seven years to serve and he agreed to so enter the plea with the understanding that two years were to be removed later while in the office of Solicitor General Boyd, (R-37) his testimony from the stand was that Solicitor General Boyd told him while in Boyd's office that Judge Dyer said he could have five years. (T-72, 77)

The Petitioner's brother testified that the understanding in Boyd's office was that A. D. Allen would get a five year total sentence. He testified in contrast to Petitioner's affidavit that nothing was said about a sentence of seven years until the plea was being entered in the courtroom. (T-88-90) In contrast to the testimony of the State's witnesses, he testified that the Solicitor General recommended five years. (T-91) In contrast to the affidavit and testimony of the Petitioner, he stated that the sentence of seven years was first mentioned in open court

and that the Solicitor General's promise to remit the two years was made in open court. (T-91)

The defense attorney's testimony conflicted with the Petitioner's. He stated there was no agreement to enter a plea of guilty to seven years to serve before the matter arose in open court. (T-42, 44) Furthermore, his testimony that the Solicitor General did not enter a recommendation of seven years to serve is amply refuted by the testimony of the State's witnesses. (T-55, 96)

In summary, the evidence was more than sufficient to support the decision of the Georgia Court of Appeals.

## REASONS FOR NOT GRANTING CERTIORARI

### A. THE SUPREME COURT OF GEORGIA'S PRIOR RULING ON THE SAME ISSUES NOT APPEALED FROM BECAME THE LAW OF THE CASE AND WAS PROPERLY HELD SO BY THE COURT OF APPEALS OF GEORGIA

In the prior decision of *Allen v. Caldwell, Warden,* 224 Ga. 47 (1968), the Supreme Court of Georgia decided the same issues presently raised in the present petition adversely to this Petitioner. No further action or appeal was taken from the Court's ruling. The Court of Appeals of Georgia, considering the same identical issues in the same case raised by the same defendant, held that the Supreme Court of Georgia's prior ruling was the law of the case. However, the Petitioner's brief ignored this ruling by the lower court.

In like manner in numerous Federal cases, the courts have consistently refused to allow a Petitioner to shop for a favorable forum as was so flagrantly attempted in this present case in the State courts.

In *Marchese,* the court held that where no new matters were presented in a subsequent appeal, the decision on the prior appeal was the law of the case. *Marchese v. U.S.,* 378 F.2d 16, cert. denied 88 S.Ct. 294, 389 U.S. 930, 19 L.Ed. 2d 283, rehearing denied 88 S.Ct. 585, 389 U.S. 1025, 19 L.Ed. 2d 674. This case simply echoed the decision of this court in *Southern Railroad Co. v. Cliff,* 260 U.S. 316, 318 (1960), which held that under the "law of the case" doctrine, an unreversed decision of a question of law or fact made during litigation settles that question for all subsequent stages of the suit. See also, *U.S. v. Swift & Co.,* 189 F. Supp. 885, 902 affirmed 81 S.Ct. 1998, 367 U.S. 909, 6 L.Ed. 2d 1249 (1960); *Wilson v Ohio River Co.,* 236 F. Supp. 96 (1964); *Boster Exchange, Inc. v. National Screen Service Corporation,* 363 F.2d 571 (1966); *Lumberman's Mutual Casualty Company v. Wright,* 322 F. 2nd 759 (1963); *U.S. v. U.S. Smelting Co.,* 339 U.S. 186 (7) (1949).

In *McClellan v. Heritage, Warden,* Judge Hooper rendering the decision for the United States District Court of Georgia held that though there isn't any strict rule of res judicata in habeas corpus proceedings, the principle of law announced by the Court of Appeals on appeal from a judgment denying a petition for a writ of habeas corpus constituted the law of the case in a later proceeding by the same prisoner to obtain a release from imprisonment under the same conviction and sentence. 234 F. Supp. 219, affirmed 337 F. 2nd 239 (1964). In *Robinson v. U.S.,* 264 F. Supp. 146 (1967), the U.S. District Court held that trial courts are not required to entertain second or successive motions to vacate upon the same or identical grounds. *Dunn v. U.S.,* 234 F.2d 219 cert. denied 352, U.S. 899, 77 S.Ct. 140, 1 L.Ed. 2d

90, *Malone v. U.S.*, 299 F.2d 254 cert. denied, 371 U.S. 863, 83 S.Ct. 122, 9 L.Ed. 2d 100, *Williams v. U.S.*, 309 F.2d 890, cert. denied 373, U.S. 940, 83 S.Ct. 1545, 10 L.Ed. 2d 694.

## B. THE MOTION TO VACATE AND SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE WAS PROPERLY HELD UNTIMELY MADE SOME THREE YEARS AFTER THE PLEA OF GUILTY AND AFTER BOTH THE PROSECUTING ATTORNEY AND TRIAL JUDGE ARE DECEASED

The Georgia Court of Appeals properly held that the Motion to Vacate and Set Aside the Judgment of Conviction and Sentence was untimely made in the present case. The motion was made over three years after the plea of guilty was entered, after both the prosecuting attorney and trial judge are deceased, and after twenty-five counts of automobile larceny were rendered moot by time served leaving only the remaining count.

The Georgia Appellate Courts have held numerous times that where a motion to withdraw a plea of guilty in a criminal case after the sentence is entered in writing and handed to the Clerk, the grant or refusal thereof is in the sound discretion of the trial courts and will not be set aside unless abused. *Williamson v. State,* 114 Ga. App. 255; *King v. State,* 91 Ga. App. 388. This same rule has been held to apply in Federal courts. *U.S. v. Folletee,* 395 F. 2nd 721 (1968); *U.S. v. Fay,* 239 F. Supp. 632, 634, affirmed 365 F.2d 832, cert. denied 386 U.S. 998, 87 S.Ct. 1319, 18 L.Ed. 2d 347 (1967); *U.S. v. Hughes,* 325 F.2d 789, 792, cert. denied 377 U.S. 907, 84 S.Ct. 1167, 12 L.Ed. 2d 178 (1964). In *Richards v. Coiner,*

290 F. Supp. 922 (1968), the Court questioned the good faith of the Petitioner, who raised the issue that the plea of guilty was not entered almost eight years later. See also, *Rakes v. U.S.*, 231 F. Supp. 812 (1964). Even more flagrant, the present issue was raised three years later after both the prosecuting attorney and the trial judge are deceased.

Thus, we submit that where the evidence presented by the Petitioner conflicts within itself and with evidence presented by the State, where the promises allegedly relied upon are attributed to a dead man, and where other witnesses allegedly able to prove such promises were not produced, the trial court did not abuse its discretion in denying the motion to vacate. Moreover, there is a presumption in favor of the validity of sentences, especially where they are passed on pleas of guilty. *Dutton, Warden v. Parker,* 222 Ga. 532.

## C. THE LOWER COURT DID NOT ERR IN FINDING THAT THE PLEA OF GUILTY WAS FREELY AND VOLUNTARILY ENTERED BY THE PETITIONER UNDER THE FACTS OF THE CASE

The only undisputed evidence in the case is that the petitioner's competent counsel clearly advised him that the court would impose a sentence of seven years to serve, the Petitioner understood that he had the right to withdraw his plea before imposition of sentence, the Petitioner was allowed to withdraw a previous guilty plea entered more than a year earlier but without a sentence being imposed due to his flight, the Petitioner understandingly and voluntarily entered a new plea of guilty and rejected the advice of his counsel to with-

draw the plea; and the trial judge entered a sentence of seven years to serve in open court.

Even assuming that Petitioner's account of the facts to be true, which we emphatically deny, the facts that are undisputed clearly show that the petitioner freely and voluntarily entered a plea of guilty with all the facts before him including the advice of competent counsel. Since this appears to be the only test, the plea of guilty was clearly voluntary. *Sorrenti v. U.S.*, 306 U.S. F.2d 236, cert. denied 373 U.S. 916, 83 S.Ct. 1306 (1962). Moreover, in light of his previous experiences with criminal Courts, Ambry D. Allen undoubtedly concluded that it was not in his best interest to stand trial. *U.S. v. Follette*, 395 F.2d 721 (1968).

Moreover as pointed out in *Brown v. Beto*, 377 F.2d 950, 953 (1967) no Federal Court has ever held a guilty plea induced by a prosecutor's promise involuntary for that reason alone. The test is whether or not the defendant was aware of the direct consequences of his plea of guilty including any commitments by the prosecutor. As pointed out in *Machibroda v. U.S.*, 368 U.S. 487, 493, 82 S.Ct. 510, 513 (1962), only if the plea is induced by promises which deprives it of a character of a voluntary act is a plea voided. *Martin v. U.S.*, 256 F.2d, 345, cert. denied 358 U.S. 921, 79 S.Ct. 294 (1958). As aptly pointed out in *U.S. v. Follette*, Supra, even a promise of a lesser sentence would not void a plea of guilty where there was no misunderstanding that the trial court would give a greater sentence than recommended. In the present case, the awareness of the facts by the petitioner is undisputed.

The incredibility of the Petitioner's story is exposed

by his own implausibility. While alleging that a guarantee was made by the now deceased prosecuting attorney beyond his power to fulfill that Petitioner would be able to serve his Federal sentence in the State Prison System within 15 days, the issue was first raised some three years later after the Federal sentence had been served. However, not one letter by the Petitioner demanding that he be transferred into State custody or any other believable proof arising during this three year period was submitted at the hearing. No issue was raised during the three year period of any alleged promise of five years to serve or the remitting of two years of the seven year sentence either at the trial, by complaint in letter form to any authority including the deceased Solicitor General Boyd, or by any formal motions. Moreover, the Petitioner's affidavit differs with his sworn testimony on several material points. (Respondent's Statement of Facts, supra.) His alleged reason for entering a guilty plea in Federal Court was his "inability to secure proper witnesses." (R-33) The credibility gap becomes even more apparent upon the realization that only after twenty-five counts of the twenty-six counts of Automobile Larceny were rendered moot by serving some portion of the sentence and after both the Prosecuting Attorney and the Trial Judge were deceased was any issue raised to the final count.

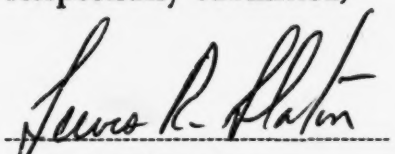
The only credible account of the events occurs from the State's witnesses. They testified that Solicitor Boyd recommended seven years to serve in open court and Williams had previously carried the message to the Petitioner that the least sentence that would be recommended would be seven years. Even then, the setting of the final sentence rested with the court.

This case clearly falls within the decision rendered in *U.S. v. Hughes,* 223 F. Supp. 477, 479, 377 U.S. 907, 84 S.Ct. 1167, 12 L.Ed. 2d 178 (1964). In that case the Court held that the Defendant knowledgeably and with the comprehensive advice of his attorney did enter a voluntary plea of guilty.

## CONCLUSION

For the foregoing reasons, Respondent urges that this Court deny the Petition for Certiorari in this case.

Respectfully submitted,



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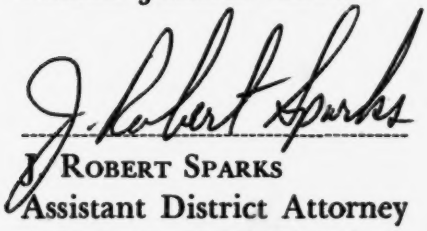

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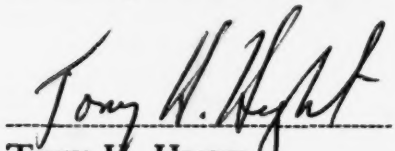

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## CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid, addressed to Mr. Frank B. Hester, Hester & Hester, 803 Fulton Federal Bldg., Atlanta, Georgia 30303, counsel of record for Petitioner.

This 24th day of March 1969.

J. Robert Sparks

J. ROBERT SPARKS
Of Counsel for Respondent